

ruling on the merits of such request, require that alternative means of clarifying the record be used whether or not a request to do so has been made under the preceding paragraph. The person requesting cross-examination shall have one week to comment on the results of utilizing such alternative means, following which the Presiding Officer, as soon as practicable, shall issue an order granting or denying such person's request for cross-examination.

**§ 57.809 Ex parte communications.**

(a) *General.* (1) No interested person outside the Agency or member of the Agency trial staff shall make or knowingly cause to be made to any member of the decisional body an *ex parte* communication relevant to the merits of the proceedings.

(2) No member of the decisional body shall make or knowingly cause to be made to any interested person outside the Agency or member of the Agency trial staff an *ex parte* communication relevant to the merits of the proceedings.

(b) *Effect of receipt of ex parte communication.* (1) A member of the decisional body who receives or who makes or knowingly causes to be made a communication prohibited by this subsection shall place in the record all written communications or memoranda stating the substance of all oral communications together with all written responses and memoranda stating the substance of all responses.

(2) Upon receipt by any member of the decisionmaking body of an *ex parte* communication knowingly made or knowingly caused to be made by a party or representative of a party in violation of this section, the person presiding at the stage of the hearing then in progress may, to the extent consistent with justice and the policy of the Clean Air Act, require the party to show cause why its claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(c) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Agency trial staff* means those Agency employees, whether temporary

or permanent, who have been designated by the Agency as available to investigate, litigate, and present the evidence arguments and position of the Agency in the evidentiary hearing or non-adversary panel hearing. Appearance as a witness does not necessarily require a person to be designated as a member of the Agency trial staff;

(2) *Decisional body* means any Agency employee who is or may be reasonably expected to be involved in the decisional process of the proceeding including the Administrator, Presiding Officer, the Regional Administrator (if he does not designate himself as a member of the Agency trial staff), and any of their staff participating in the decisional process. In the case of a non-adversary panel hearing, the decisional body shall also include the panel members whether or not permanently employed by the Agency;

(3) *Ex parte communication* means any communication, written or oral, relating to the merits of the proceeding between the decisional body and an interested person outside the Agency or the Agency trial staff which was not originally filed or stated in the administrative record or in the hearing. *Ex parte* communications do not include:

(i) Communications between Agency employees other than between the Agency trial staff and the member of the decisional body;

(ii) Discussions between the decisional body and either:

(A) Interested persons outside the Agency, or;

(B) The Agency trial staff if all parties have received prior written notice of such proposed communications and have been given the opportunity to be present and participate therein.

(4) *Interested person outside the Agency* includes the smelter owner, any person who filed written comments in the proceeding, any person who requested the hearing, any person who requested to participate or intervene in the hearing, any participant or party in the hearing and any other interested person not employed by the Agency at the time of the communications, and the attorney of record for such persons.

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